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[Notes: At the time of my trial, it was almost certain that a fairminded\* appellate court would have overturned any decision convicting me. And it was very probable that a fairminded district court judge would have given instructions on the basis of which a fair jury would have acquitted me.

A fairminded court would be, among other things, one not mainly appointed by Nixon or Reagan or Bush. A fairminded judge would, among other things, not be one who was offered, either at the beginning or near the end of the trial, his life's ambition, the directorship of the FBI (if he stayed in the President's good graces, in light of the outcome of the trial).

Neither of the initial predictions would hold, if the trial or appeal were held today, after the Morison case and a number of appellate decisions giving the benefit of the doubt to the Executive Branch with respect to classification and "national security." In practical legal terms, though not explicitly or formally, the fundamental constitutional law has changed. A fundamental and perhaps fatal restriction on democratic government has, at last, been legally instated, by legal precedents though not by legislation.

The initial judgments of hypothetical decisions--which were not tested because of the peculiar, unprecedented ending of my trial--have almost never been the subject of speculation elsewhere. (It is just as well they were not tested at the district court level, since my judge was not "fairminded" in the required sense. He would--I believe--almost surely have protected his availability to accept Nixon's offer by giving instructions that could have led to my conviction on theft).

Where the Supreme Court case on the injunctions had to do with the right of the Times and the Post to publish the documents they had received, my case had to do fundamentally with my right to have given them those documents.

My defense was not framed in those terms, but that was the underlying issue. Formally, my lawyers were arguing that I had not violated the laws in question, as those laws had always been interpreted: and as they had had to be interpreted to avoid Constitutional challenge as "vague" or "overbroad," i.e., as being unconstitutional by violating the First Amendment.

Thus, we were arguing that any law preventing me from passing on this information to the press and public would violate my First Amendment right of free speech. But since we argued on the assumption that the laws with which I was charged were not of such a nature--they had never been and should not be interpreted in such

a way that I could be held to have violated them--we were not called on to refer at all to the First Amendment or to my rights.

The initial judgments are quite contrary to uninformed public opinion: i.e., to virtually all public opinion, whether of laymen or of lawyers and officials. Almost no one was familiar with either legislative or judicial history and discussion of the issues, because they had never arisen in court before.

Indeed, there was a general belief that the case against the government's demand for an injunction was much weaker than the case against me (which was, wrongly, thought to be very strong). That was taken to be confirmed by the fact that the Court opinion against the injunctions was only 6-3, and that there was considerable difference of opinion even within the majority.

Actually, the spread of opinion on the Court seemed to reflect, rather, misgivings about the speed with which the decision had had to be rendered, and thus the inadequate study of the documents or reflection on the issues, all this in the light of very strong claims of possible injury by the Government.

of course, the state of the law respecting my case was only one factor in predicting a possible outcome. There is always the questionn, as well, as the political context--the temper of the times--and the composition of the various courts (along with the character of the defense, and the circumstances of the case and the defendants. On the latter point: the fact that, for some reason, Morison was not put on the stand, and that the circumstances suggested pecuniary and career motives for his actions--though not directly related to the law--seemed to have had a strong influence on the outcome in the district court, and probably at the appellate level too).

(call Marty Garbus)